91-114 (2)

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

In re Crystal Dawn K., a minor,

CYNTHIA LYNN WINN, Petitioner

vs.

JOSEPH ALEX KOMPKOFF, Respondent

On Petition for a Writ of Certiorari to the Court of Appeal, Third Appellate District, State of California

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH A. KOMPKOFF, JR.
Respondent
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In Pro Per

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The principal issue in this case is whether the Indian Child Welfare Act, 25 U.S.C. §1901 et seq., and its provisions relating to termination of parental rights,

specifically section 1912 subsections (d) and (f), apply to a proceeding brought by one parent to terminate the parent-child relationship between an Indian parent and his Indian child. After careful analysis, the Court of Appeal for the Third Appellant District held that the Indian Child Welfare Act does indeed apply to such a proceeding and reversed the decree terminating the Indian father's parental rights. The opinion of the Court of Appeal is attached to petitioner's petition as Appendix A (hereinafter "Pet. App.")

This court need not hear this case because the Court of Appeal's decision is correct and, further, the Court of Appeal's decision is wholly consistent with state and federal law.

STATEMENT OF THE CASE

Respondent Joseph Kompkoff is a full-blooded Aleut. Pet. App. 11a. He is a member of the Native Village of Chanega.

Pet. App. 47a. The Native Village of Chanega is a federally recognized Indian tribe. Pet. App. 3a

Crystal Dawn Kompkoff, the child of petitioner Cynthia Winn, and respondent Joseph Kompkoff, is 1/2 degree Aleut and a member of the Native Village of Chanega. Crystal was born on December 5, 1981, in Alaska, where she lived with her parents and paternal relatives until her parents separated approximately ten months after her birth. Following separation, the mother and child moved to California where a divorce action occurred. The mother subsequently re-married. Pet. App. 2a.

On November 9, 1987, Cynthia Winn filed a petition pursuant to Civil Code Section 232 in Trinity County Superior Court to declare her daughter Crystal free from the custody and control of respondent.

Ibid. The clear purpose of the petition is to free the child for adoption by her step-father. Pet. App. 51a.

On December 14, 1987, counsel was appointed for respondent. Pet. App. 3a. Shortly thereafter, on December 28, 1987, the Native Village of Chanega moved to intervene alleging that Crystal Dawn Kompkoff is an Indian child covered by the Indian Child Welfare Act and that under the Act the Tribe is entitled to intervene. Ibid. On January 25, 1988, the court granted the Tribe's motion to intervene under the Indian Child Welfare Act, 25 U.S.C. Sec. 1900 et seq. Pet. App. 3a.

The Tribe moved for judgment on the pleadings due to the original petition's lack of allegations relating to 25 U.S.C. Section 1912, subparagraphs (d) and (f). These motions were granted, and petitioner then filed an amendment to the petition. Pet. App. 47a. The amended petition

alleged that the petitioner had separated from Crystal's father "only after all remedial and rehabilitative efforts had failed", and that to continue the custodial rights of JOSEPH ALEX KOMPKOFF, JR., is likely to result in serious emotional or physical damage to said child. Pet. App. 4a.

A hearing on the amended petition was held October 3, 1988. Mr. Kompkoff, who lives in Alaska, could not attend but appeared by counsel. Pet. App. 50a. All parties proceeded under the assumption that the Indian Child Welfare Act applied and that its standards would have to be met before the petition could be granted. The petitioner and her husband testified. In addition, a psychologist testified as a witness for the mother. Pet. App. 8a. At the close of petitioner's case the respondent's counsel called a second psychologist who testified concerning the

psychological effects of severing the child's ties with her Indian parent and tribe. Pet. App. 9a-11a. Both psychologists testified that it would be detrimental to Crystal to terminate respondent's parental rights.

On January 5, 1989, the court announced its tentative decision. Pet. App. 46a. Counsel for the intervenor, Native Village of Chanega, filed objection to the proposed statement of decision. On February 21, 1989, the court signed a decree declaring Crystal free from her father's custody and control on the grounds he had abandoned the child within the meaning of Civil Code Section 232. In an accompanying ruling on the intervenor's objections to his proposed statement of decision, the court ruled that the Indian Child Welfare Act did not apply to the case.

The Court of Appeal, Third Appellant District, in a comprehensive opinion, reversed and remanded. Pet. App. 1a-44a. The Court of Appeal rejected the trial court's characterization of the termination of parental rights proceeding as a private matter between the child's parents, similar to a divorce proceeding and hence not covered by the Act. It held that the Indian Child Welfare Act is indeed applicable and that the standards set forth in section 1912 (d) and (f) apply to this proceeding to terminate the father's parental rights.

A petition for review to the California Supreme Court was denied. Pet. App. 45a. This petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

The Decision of the Court of Appeal is correct and does not conflict with any decision of this Court or any other California appellate court.[1] It is wholly consistent with the Act, its legislative history and the liberal interpretation of the Act approved by the United States Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield, (1989) 490 U.S. 30 [104 L.Ed.2d, 109 S.Ct.1597]. It is consistent with other post Holyfield cases applying the Act.[2] No further review is warranted.

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1. As pointed out by the Court of Appeal, the fact that the proceeding at issue herein is an action to terminate parental rights, and that Crystal Kompkoff is a member of a federally recognized Indian tribe, distinguishes this case from In re Wanomi P., (1989) 216 Cal.App.3d 156.

2. See, Matter of Adoption of Baade (S.D. 1990) 462 N.W. 2d 485; In Re Adoption of Lindsay C. (1991) 280 Cal. Rptr. 194.

1. The Court of Appeal correctly concluded that the Indian Child Welfare Act applies to this proceeding.

The Indian Child Welfare Act is expressly made applicable to the following child custody proceedings involving an Indian child: foster care placements, 25 U.S.C. §1903 (1)(i); pre-adoptive placements, 25 U.S.C. §1903 (1)(iii); adoptive placements, 25 U.S.C. §1903 (1)(iv); and, termination of parental rights, 25 U.S.C. §1903 (1)(ii). Expressly excluded from the definition of child custody proceeding are "a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. §1903 (1).

25 U.S.C. § 1903(1)(ii) defines "termination of parental rights" as "any action resulting in the termination of the

parent-child relationship." 25 U.S.C. §1903 (4) defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Contrary to petitioner's surprising assertion that this case involves a child who is not a member of a tribe, the record makes it abundantly clear that Crystal is a tribal member. The record reflects the Native Village of Chanega's unequivocal determination that Crystal is a member of that tribe. Pet.App. 3a,4a-5a,6a. This fact is not in dispute. In any event, The Tribe's determination is conclusive. In re Junious M., 144 Cal.App. 3d 786, 793, 193 Cal.Rptr. 40, 44 (1st Dist. 1983); Bureau of Indian Affairs, Guidelines for State Courts, Indian Child Welfare Custody Proceedings, 44 Fed.Reg. 67584, 67586 (Nov.

26, 1979); see Santa Clara Pueblo v. Martinez, (1978) 436 U.S. 49,62-66, 98 S.Ct. 1670, 1679-81, 56 L.Ed.2d 106.

In order to exclude the proceeding from application of the Act, the trial court determined that the Civil Code section 232 action is "inextricably tied to the divorce proceeding." Pet. App. 24a. As correctly noted by the Court of Appeal:

> this view is simply incorrect and ignores the plain language of the section. A "child custody proceeding" for purposes of the Act includes "any action resulting in the termination of the parent-child relationship." (§ 1903 (1)(ii), emphasis added.) The excluding language, i.e., "a placement based...upon an award, in a divorce proceeding, of custody to one of the parents" (emphasis added), on its face means a custody dispute involving a placement in a divorce proceeding. Congress delineated the only exclusions and judicially created exclusions cannot be added. (In re Junious M., supra, 144 Cal.App.3d at p. 796; A.B.M. v. M.H., supra, 651 P.2d at P.1173; In re Custody of S.B.R. (Wash.App. 1986) 719 P.2d 154, 156.)

Pet. App. 24a-25a.

2. The appeals court correctly concluded that 25 U.S.C. §1912, subsections (d) and (f) apply to this proceeding.

Although he did not have physical custody, as the Court of Appeal correctly noted, Joseph has some type of legal parenting relationship with Crystal. Hence, the need to bring a petition to terminate his custody and control of his daughter. It is this relationship that subsections (d) and (f) apply to.

Petitioner misstates the facts and the law when she asserts that Sections 1912 (d) and (f) should not apply to this proceeding but should be limited because the mother could have been given sole custody at the time of the divorce "without complying with the standards fixed by §1912 (d) & (f), and the adoption could have proceeded without having to file a termination proceeding under Civil Code Section 232. Pet. 14. The awarding of legal and physical custody

in a dissolution action is not synonymous with termination of parental rights, and the purpose of a dissolution and termination action are not the same. An award of even sole legal and physical custody in a dissolution action does not result in the termination of a the parent-child relationship between the child and the non-custodial parent. Such a result requires a separate action, an action that is subject to the Indian Child Welfare Act when an Indian child is involved.

The appeals court correctly construed section 1912, subdivision (d) and (f) to apply to this proceeding. Under subdivision (d), Petitioner is required to show active and timely efforts to provide remedial and rehabilitative services directed at remedying the basis for the parental termination, and that these efforts were unsuccessful. Pet. App.

36a-39a. The reference to "break up of the Indian family" does not require that the child be in the physical custody of the Indian parent as a prerequisite to application of the subsection. Rather, section 1912 (d) is simply directed at "attempt[s] to preserve the parent-child relationship." In re Appeal in Pima County Juvenile Action, (Ariz.App. 1981) 130 Ariz. 202; 635 P.2d 187, 193. Cited with approval by the U.S. Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield, (1989) 490 U.S. 30 [104 L.Ed.2d 29, 109 S.Ct. 1597]

The Court of Appeal provided examples of very reasonable undertakings a private party could pursue to meet the burden of 1912 (d). Pet. App. 38a-39a. Thus, petitioner's assertion that "an impossible burden" is placed on parties seeking to impact the Indian family and tribal relationship is simply not true.

Similarly, subdivision (f) was interpreted by the Court of Appeal "to mean whether the evidence establishes beyond a reasonable doubt that Crystal would likely experience serious emotional or physical harm if Joseph retained the legal and/or physical custody provided him under State law or tribal law or custom." Pet. App. 43a.

As noted by the appeals court, "custody" means something more than mere physical custody. While the term itself is not defined in the Act, it appears in several places. The definition of "Indian Custodian" set forth in section 1903 (6) of the Act expressly recognizes different types of custody, distinguishing between "physical" and "legal" as determined by State or Tribal law or custom. Pet. App. 40a-41a.

3. Petitioner's argument questioning the constitutionality of the Act is not persuasive.

First, concern that parties will be denied access to state courts is particularly curious in this case in that the issue is minimal standards to be applied only in state court proceedings.

Second, concerns regarding blood quantum as a nexus for applicability of the Act are irrelevant in that Crystal is a member of her Tribe.

The constitutionality of the Act was discussed at great length in the legislative history and the concerns expressed by petitioner fully addressed. See H.R. Report No. 95-1386, 95th Cong.2d Sess. (1978), reprinted in [1978] U.S. Code Cong. and Ad.News 7530, 7534-7541. Additionally, several cases have considered and upheld the constitutionality of the Indian Child Welfare Act. See In Matter of

Appeal in Pima County, 635 P.2d 187 (Ariz.Ct.App. 1981), cert.den. 455 U.S. 1107 (1982); Angus v. Joseph, 655 P.2d 208 (Oregon App. 1982), pet.den. 660 P.2d 683, cert.den. 464 U.S. 830, 78 L.Ed.2d 109, 104 S.Ct.107(1983).

4. The decision of the Court of Appeal is consistent with the intent and purpose of the Act.

Petitioner asserts that the narrow focus and purpose of the Act is to establish minimum federal standards for the removal of Indian children "so that members may not be removed from the family or the tribe without stringent procedures being followed." Pet. 8-9. While removal safeguards are an important aspect of the Act, the actual purpose is that correctly noted by the Court of Appeal, citing In re Appeal in Pima County Juvenile Action, (Ariz.App. 1981) 130 Ariz. 202 [635 P.2d 187, 188]: "In the [ICWA], Congress

declared a two-fold national policy: the protection of the best interests of Indian children, and the promotion of stable and secure Indian tribal entities. 25 U.S.C.A. §1902." Pet. App. 16a.

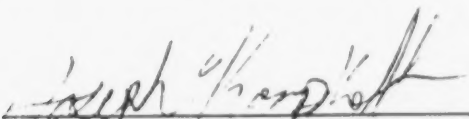
The means to accomplish the purpose of the Act and to promote the national policy the Act reflects, among other things include the minimal federal standards set forth in the Act. However, these standards are but "minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe." House Report at 19. The decision of the Court of Appeal is consistent with the terms and purpose of the Act as reflected on its face and in its legislative history.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: July 30, 1991

Respectfully submitted.



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